SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 13

THE TRAINOR COMPANY, PETITIONER,

vs.

THE ÆTNA CASUALTY & SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 17, 1933

IN THE

District Court of the United States,

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 15318. March Term, 1930.

THE TRAINOR COMPANY	David L. Ullman
v.	
THE AETNA CASUALTY & SURETY COMPANY.	J. W. Henderson

DOCKET ENTRIES.

Mar. 31, 1930.	Præcipe to issue Summons filed.
Mar. 31, 1930.	Summons exit—returnable 1st Monday in April.
Mar. 31, 1930.	Statement of Claim filed.
Mar. 31, 1930.	Notice to file affidavit of defense filed.
Apr. 1, 1930.	Summons returned: "service accepted as of March 31, 1930" and filed.
Apr. 10, 1930.	Affidavit of Defense and New Matter filed.
Apr. 10, 1930.	Notice to file reply to new matter filed.
Apr. 16, 1930.	Præcipe to place case on Trial List filed.
Apr. 24, 1930.	Stipulation of counsel in re: Affidavit of Defense filed.

Apr. 26, 1930.	Rule for judgment for want of sufficient affidavit of defense and answer in lieu of demurrer to new matter filed.
Oct. 21, 1930.	Plaintiff's reply to new matter filed.
Oct. 22, 1930.	Præcipe to withdraw rule for judgment for want of sufficient affidavit of defense filed.
Oct. 30, 1930.	Stipulation of counsel to try case before the Court without a jury filed.
Nov. 5, 1930.	Trial before Court without a jury.
Dec. 19, 1930.	Argued sur Pleadings and Proofs.
Feb. 13, 1931.	Opinion, Kirkpatrick J., granting leave to enter judgment in $5.00 for plaintiff filed.
Feb. 17, 1931.	Motion for new trial filed.
Feb. 17, 1931.	Plaintiff's motion for judgment on the record filed.
Feb. 17, 1931.	Plaintiff's bill of costs filed.
June 19, 1931.	Order of Court denying motion for new trial filed.
Oct. 21, 1931.	Order of Court denying motion for judgment on the record filed.
Dec. 1, 1931.	Præcipe to enter judgment in favor of plaintiff filed.
Dec. 1, 1931.	Judgment in favor of plaintiff in $5.00 and against defendant filed.
Dec. 1, 1931.	Bond for costs sur appeal in $250, with surety, and Order of Court approving bond filed.

Dec. 1, 1931. Bill of Exceptions and Order of Court sealing same filed.

Dec. 1, 1931. Petition for appeal and Order of Court granting appeal filed.

Dec. 1, 1931. Citation allowed and issued.

Dec. 1, 1931. Copy of notice of appeal filed.

Dec. 7, 1931. Assignments of Error filed.

Dec. 10, 1931. Citation returned: "service accepted" and filed.

Dec. 31, 1931. Præcipe as to transcript of record sur appeal filed.

PLAINTIFF'S STATEMENT OF CLAIM.

(Filed March 31, 1930.)

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 15318. March Term, 1930.

The Trainor Company (a Corporation),

v.

The Aetna Casualty & Surety Company (a Corporation).

The plaintiff, The Trainor Company, claims of the defendant, The Aetna Casualty & Surety Company, the sum of $18,006, with legal interest thereon from March 1, 1930, upon a cause of action, whereof the following is a statement:

1. The plaintiff is a corporation organized under the laws of the State of Delaware for the purposes, *inter alia,* of engaging in the real estate brokerage or realty business, and duly authorized to do business in the Commonwealth of Pennsylvania.

2. The defendant is a corporation organized under the laws of the State of Connecticut and engaged, *inter alia,* in the business of executing, for a consideration or premium, bonds guaranteeing the completion of building operations.

3. This controversy is of a civil nature, and the amount involved exceeds the sum of $3000 exclusive of interest and costs.

4. On or about the thirteenth day of October, 1927, the defendant, The Aetna Casualty & Surety Company, executed under seal and for a consideration or premium, its certain bond or writing obligatory, and did acknowledge itself held and firmly bound unto The Trainor Company, its successors, assigns and nominees, in the sum of $220,000 upon, *inter alia*, the following terms and conditions:

"

"WHEREAS, the said Principal further desires that said Trainor Company accept its collateral note in the amount of ($28,000) Twenty-eight Thousand Dollars bearing six per cent interest, which is the balance of the purchase price due said Trainor Company by said Principal in the sale of Fifty-two lots hereinafter mentioned, and have offered as security to said obligees, respectively, the following mortgage collateral:

"

"(c) Said Trainor Company is to have the equity in the said Fifty-two First Mortgages subject to and above the said loans of said Trust Company and Realty Bond, and in the said Blanket Second Mortgage subject to and above the loan of said Realty Bond:

"

"NOW, THEREFORE, THE FURTHER CONDITIONS OF THIS BOND ARE AS FOLLOWS:

"1. That, if within ten months from the date hereof each of the lots or premises described in each of the said Fifty-two First Mortgages shall be fully improved and completed with a building, together with the other improvements (such as paved streets, sidewalks, driveways, gas, water, sewerage, etc.), in keeping with and as shown by the aforesaid Plans, Specifications and Conditions, Building Plats and Surveys,

"

"THEN, in the event that all of the above and below mentioned conditions are fully performed, this Bond shall be void, otherwise it shall remain in full force and effect in law."

A full, true and correct copy of the said Bond and obligation is attached hereto, made part hereof, and marked Exhibit "A."

5. In consideration of its execution of the said bond, as more fully set forth above, the defendant, The Aetna Casualty & Surety Company, received and retained as consideration or premium the sum of $3300.

6. Plaintiff avers that the conditions of the said bond were not fully performed, but that the said conditions were breached and broken in that each of the said fifty-two lots or premises covered by the said bond were not fully improved and completed with a building, together with the other specified improvements, within ten months from the date of the said bond (to wit: October 13, 1927); but that on the contrary but twelve of the said fifty-two lots were fully completed and improved upon the expiration of the said ten months' period (to wit: August 13, 1928); and the remaining lots and premises were and remained in an unfinished, incomplete and only partially improved condition for a long period of time after the said ten months' period had expired, so that twenty-eight of the said premises still remained incomplete and unfinished, as aforesaid, as of the date this suit was filed, to wit: December 22, 1929.

7. Plaintiff further avers that during and at the expiration of the said ten months' period, to wit: From October 13, 1927, to August 13, 1928, the fair, reasonable and market value of the said lots or premises improved and completed in keeping with and as shown

by the plans, specifications and conditions, building plats and surveys as specified in the said bond, was not less than $7950 each; and plaintiff further avers that each of the twelve lots, or premises, so improved and completed within the said ten months' period was actually sold at a bona fide price of not less than $7950 each.

8. Plaintiff avers that in the interim between the expiration of the said ten months' period (to wit: August 13, 1928) and the time when the premises then remaining unfinished were finally completed and improved in accordance with the plans, specifications and conditions, building plats and surveys specified in the said bond, that the fair market value of the said lots or premises as so improved had decreased, in part due to the decline in the real estate market, and further due to the fact that other operative builders had then completed homes in the immediate vicinity and substantially of the same general character, but including additional facilities, which were offered for sale at a much lower price, so that the fair, reasonable and market value of the said lots or premises improved in accordance with the provisions of the bond was not more than $6550 each at the time when the last twenty-eight of them were finally completed.

9. Plaintiff further avers that liens and encumbrances senior to that held by the plaintiff, together with accumulated interest and penalties, necessary sales expense and other charges taking precedence over the plaintiff's lien substantially exceeded the sum of $6550, which was as aforesaid, the fair market value of the premises when finally completed.

10. Plaintiff avers that taxes and interest on mortgage liens were permitted to accumulate and remain

unpaid on the unfinished properties, so that on or about January 26, 1930, the twenty-eight premises then remaining unsold were sold by the sheriff of Delaware County as a result of foreclosure proceedings on liens senior to that held by the plaintiff, and at said sale were sold to the attorney on the writ for the sum of $50 each.

11. Plaintiff avers that it has received on account of its said obligation the sum of $28,000, with interest thereon, the sum of $13,026.02 and no more.

WHEREFORE, the plaintiff claims there is justly due and owing to it from the defendant the sum of $18,006 with legal interest thereon from the first day of March, 1930.

Hence this suit.

DAVID L. ULLMAN,
Attorney for Plaintiff.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

EDWARD E. DICKER, being duly sworn according to law, deposes and says that he is the secretary of THE TRAINOR COMPANY, plaintiff in the foregoing action, and authorized by it to take this affidavit on its behalf; that he is familiar with the facts hereinbefore set forth, and the said facts are true.

E. E. DICKER.

Sworn to and subscribed before me this thirty-first day of March, A. D. 1930.

HARRY B. BERK,
Notary Public.

EXHIBIT "A."

KNOW ALL MEN BY THESE PRESENTS: That COPLEY HOMES, INC., a Delaware Corporation, hereinafter called Principal, and THE AETNA CASUALTY AND SURETY COMPANY, a Corporation organized under the Laws of the State of Connecticut, hereinafter called Surety, said Principal and Surety hereinafter called Obligors, are held and firmly bound unto THE LAND TITLE AND TRUST COMPANY, a Pennsylvania Corporation, its Successors, Assigns and Nominees, hereinafter called Trust Company, unto REALTY BOND AND FINANCE CORPORATION, a Delaware Corporation, its Successors, Assigns and Nominees, hereinafter called Realty Bond, and unto THE TRAINOR COMPANY, a Delaware Corporation, its Successors, Assigns and Nominees, hereinafter called Trainor Company, said Trust Company, Realty Bond and Trainor Company hereinafter called Obligees, in the sum of ($220,000.) Two Hundred Twenty Thousand Dollars, to be paid to each of the said Obligees, their respective Successors, Assigns and Nominees, and as hereinafter provided, to the payment whereof the said Obligors do hereby bind themselves, jointly and severally, their and each of their Successors and Assigns, firmly by these presents:

THIS BOND SEALED with the seals of the Obligors and dated the Thirteenth day of October, 1927.

WHEREAS, the said Principal desires to obtain a loan of ($238,000.) Two Hundred Thirty-eight Thousand Dollars from the said Trust Company, on its collateral note, bearing six per cent interest, and a loan of ($63,000.) Sixty-three Thousand Dollars from said Realty Bond, on its collateral note, bearing six per cent interest, and said Principal further desires that said Trainor Company accept its collateral note in the amount of ($28,000.) Twenty-eight Thousand Dollars,

bearing six per cent interest, which is the balance of the purchase price due said Trainor Company by said Principal in the sale of the Fifty-two lots hereinafter mentioned, and have offered as security to said Obligees, respectively, the following mortgage collateral:

(a) Firty-two individual first Mortgages and accompanying Bonds and Warrants, to be delivered and assigned to said Trust Company and/or its Assigns or Nominees, bearing date of the Thirteenth day of October, 1927, and executed by Margaret M. Rogers, as Mortgagor, in favor of said Principal as Mortgagee; each of said Mortgages being secured by the conveyance therein of a lot of ground and premises located on the Southeasterly side of Copley Road, between Walnut and Locust Streets, Township of Upper Darby, Delaware County, State of Pennsylvania, each of Forty-eight of said Mortgages and Bonds and Warrants securing the repayment of a loan of ($4500.) Forty-five Hundred Dollars with interest, each of Two of said Mortgages and Bonds and Warrants securing the repayment of a loan of ($6000.) Six Thousand Dollars with interest, and each of the remaining Two of said Mortgages and Bonds and Warrants securing the repayment of a loan of ($6500.) Sixty-five Hundred Dollars with interest, the total of the principal amounts of the said Fifty-two Mortgages being ($241,000.) Two Hundred Forty-one Thousand Dollars;

(b) One Blanket Second Mortgage with accompanying Bond and Warrant securing the principal of ($88,000.) Eighty-eight Thousand Dollars, to be delivered and assigned to said Realty Bond and/or its Assigns or Nominees, bearing same date as aforesaid first Mortgages, executed by same Mortgagor in favor of same Mortgagee, secured by Forty-eight (inside lots) of the aforesaid Fifty-two lots and premises

(which lots and premises may be partially released as provided in said Blanket Second Mortgage or as assented to from time to time by the then holder of said Blanket Second Mortgage), and which Blanket Second Mortgage is subject to the operation and effect of each of said ($4500.) Forty-five Hundred Dollar First Mortgages on each of said lots, and said Realty Bond is also to have the equity in the said Fifty-two first Mortgages subject to and above the said loan of the Trust Company;

(c) Said Trainor Company is to have the equity in the said Fifty-two first Mortgages subject to and above the said loans of said Trust Company and Realty Bond, and in the said Blanket Second Mortgage subject to and above the loan of said Realty Bond; and

WHEREAS, the said Obligors, to induce the said Trust Company and the said Realty Bond to grant the above loans of money on the security of said Mortgages, as aforesaid, and to induce the said Trainor Company to accept the said collateral note for sale balance of purchase price, on the security of the said equities in said Mortgages, represent and warrant that each of the said Fifty-two lots will be improved with a building and other improvements (such as paved streets, sidewalks, driveways, water, gas, sewerage, etc.), in keeping and in accordance with the Plans, Specifications and Conditions, Building Plats and Surveys, identified by the signatures of the said Obligors, by any officer or agent, and by Louis S. Ashman, Agent, free and clear of any and all Municipal and Mechanics' Liens, taking or claimed to be taking precedence over any of aforesaid Mortgages; and

WHEREAS, the Obligors to induce the said Trust Company or any other Title or Trust Company to issue

its Municipal and/or Mechanics' Liens insurance (at any time) in favor of any Mortgagee, Assignee, Purchaser and/or Grantee, of or relating to any one or more of said Fifty-two lots, have agreed to hold any such Title or Trust Company harmless from loss, cost or damage due to its issuance of the aforesaid liens insurance; and

WHEREAS, to induce and aid the ready sale, mortgaging, financing and refinancing of any one or more of said Fifty-two lots, with the improvements and additions aforementioned, the Obligors herein and hereby agree to hold any insuring Trust and/or Title Company, Purchaser, Grantee and/or Mortgagee of any of said lots or premises, and their respective Heirs, Personal Representatives, Successors and Assigns, harmless from any loss, cost or damage due or claimed to be due to any Municipal and/or Mechanic's Liens arising from the making of any part of the said buildings and improvements, with the right to any such party or parties to recover on this Bond as fully and as effectively as if such party or parties were specifically named as obligees herein.

NOW, THEREFORE, THE FURTHER CONDITIONS OF THIS BOND ARE AS FOLLOWS:

1. That, if within ten months from the date hereof each of the lots or premises described in each of the said Fifty-two first Mortgages shall be fully improved and completed with a building, together with the other improvements (such as paved streets, sidewalks, driveways, gas, water, sewerage, etc.), in keeping with and as shown by the aforesaid Plans, Specifications and Conditions, Building Plats and Surveys, (but said Trust Company and its Successors may in writing direct or assent to changes or additions in the said Plans

and Specifications that do not increase the total cost of construction as shown by the Schedule of Operation approved by the said Principal at settlement, by more than five per cent, and such changes or additions so directed or approved by said Trust Company shall be made and complied with as fully and as effectively as if they were originally written into the said Plans and Specifications); and

2. That, if each and all of the said buildings and other improvements, as aforesaid, shall be made, free and clear of all Municipal and Mechanics' Liens for material and/or Labor taking or claimed to be taking precedence or priority to or over any or all of the said Mortgages, and/or the lots or premises secured thereby; and

3. That, if the said Trust Company, its Assigns or Nominees, are held harmless from all costs and loss due to its issuance of its insurance, as aforesaid, and the Trust Company is otherwise held harmless from any damage, cost or loss, and all other named or unnamed Obligees under the terms of this Board are held harmless from any damage, cost or expense;

THEN, in the event that all of the above and below mentioned conditions are fully performed, this Bond shall be void; otherwise it shall remain in full force and effect in law.

In addition to any other remedy or measure of damage provided for or recoverable under the terms of this Bond, any one or more of the herein named Obligees are hereby authorized and empowered (in their respective discretion) at the expense of, in the name of, and for the joint or several account of the obligors, to do any or all of the following things (shown in paragraphs (a) to (c), inclusive):

(a) On ten days written notice to the herein Surety, any one or more of the said Obligees may replace any Contractor who may fail to diligently proceed (for any reason) to perform the work and/or supply the material covered by his or their Contract for any part of the building or improvements covered by the aforesaid Plans and Specifications and Conditions, and may in place and stead of such replaced Contractor, employ any other party or parties to do, supply and complete the work and/or material called for under the terms of any such Contract. However, said Surety shall have the right within said ten days to arrange for the prompt supply and completion of such work and material, with a party or parties satisfactory as to competence to said Trust Company or its Successors.

(b) On fifteen days written notice to the herein Surety, any one or more of the said Obligees may pay and discharge, or defend, any Municipal or Mechanics' Lien directed against any of the aforesaid mortgaged premises, when such lien takes precedence or is claimed to take precedence to or over any of the aforesaid First or Second Mortgages. However, within said fifteen days the said Surety may pay and discharge such liens, or may defend same to the satisfaction of said Trust Company or its Successors.

(c) Should the said buildings and improvements be not fully completed in accordance with the aforesaid Plans and Specifications and Conditions within ten months from date hereof, any one or more of said Obligees may on fifteen days written notice to the herein Surety, arrange or contract for the completion of such unfinished work and/or material. However, said Surety may within the said fifteen days arrange for the completion of said unfinished work and ma-

terial within sixty days from the date of such notice, by a party or parties satisfactory as to competence to said Trust Company or its Successors.

In the event that any of the aforesaid buildings and improvements are not made and completed, free and clear of Municipal and Mechanics' Liens, as aforesaid, within the aforesaid ten months time for completion, and any holder of any of aforesaid three collateral notes shall thereafter cause the mortgage collateral or the equity in the mortgage collateral mentioned therein and still held to be offered at public sale, upon forty-five days written notice to said Obligors, mailed to the Philadelphia office or agency of the said Surety, of the place (in Philadelphia) and time, when such collateral will be publicly offered for sale, it is hereby agreed that any balance still remaining due and unpaid under the terms of such note, after applying the net proceeds arising from such sale, shall be, jointly and severally, due and payable by the said obligors unto the then holder of such note and assigns, as fully and effectively as if such holder and assigns were named Obligees in this Bond. The provisions of this paragraph shall be deemed an additional method for the establishment of any loss in the collection of the money or monies due under the terms of the said notes, respectively, due to incompletion, free and clear of liens, as aforesaid, and other rights, promises or obligations existing or arising under the terms of this Bond shall remain in force and effect, whether or not said method is employed.

Any holder at any time of any of said three notes, may assent to the release of any of the collateral mentioned therein upon such terms and for such considerations as may seem expedient to the holder.

No action shall be brought on this Bond after thirty-six months from the date hereof.

WITNESS the signatures and seals of the said Obligors, the day and year first above written.

COPLEY HOMES, INC.,

By: LOUIS W. FOLSCHEID
(~~Vice~~) President.

ATTEST:

HARRY J. GELSMAN
Secretary

THE AETNA CASUALTY AND SURETY COMPANY,

By: WILLIAM P. ROBERTS
Resident Vice-President.

ATTEST:

A. F. TIMMINS
Resident Asst. Secretary.

AFFIDAVIT OF DEFENSE.

(Filed April 10, 1930.)

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.:*

James J. Murray, being duly sworn according to law, deposes and says that he is resident vice-president of the Aetna Casualty and Surety Company; that he is authorized to make this affidavit of defense in its behalf; and that it has a just, true, full, legal and complete defense to the whole of the plaintiff's claim of the following nature and character, to wit:

1. Admitted.

2. Admitted.

3. Admitted.

4. The defendant admits that the bond attached to the statement of claim marked Exhibit "A" is a true and correct copy of the bond executed by the defendant, and, therefore, denies any averments in this paragraph which are inconsistent with the said bond, as it speaks for itself.

5. It is admitted that the defendant received the sum of $3300 as a premium on said bond marked Exhibit "A."

6. The defendant, after having made inquiry from all sources of information open to it, is informed, believes and expects to be able to prove at the trial of this cause that more than twelve of the fifty-two lots were fully improved and completed with the buildings, together with the other specified improvements, within

ten months from the date of said bond, and that the remaining lots and premises were substantially completed at that time, in accordance with the custom of the building operation business, and that the entire building operation was completed fully on or before December 27, 1929.

7. The defendant admits that certain of the completed houses were sold for the sum of $7950 each during the year 1928, and that likewise certain of the premises were sold in 1929 for the same price, and that the fair, reasonable and market value of the said lots and premises so improved and completed within the ten months from the date of the bond was not less than $7950 each.

8. The defendant, after having made inquiry from all sources of information open to it, is informed, believes and expects to be able to prove at the trial of this cause that the premises which were unfinished within the ten months' period from the date of the bond had not decreased or depreciated so that the fair, reasonable and market value of the said lots and premises improved in accordance with the provisions of the said bond was not more than $6500 each at the time the last twenty-eight of them were finally completed, but avers and expects to be able to prove that at the expiration of the ten months from the date of the said bond, the said real estate, with the buildings thereon in their uncompleted state, had a fair, reasonable and market value in excess of the sum of $6500 each, being in excess of the amount of the liens thereon, including the equity in the first and second mortgages, which were security for the collateral note, the basis of this suit.

9. The defendant, after having made inquiry from all sources of information open to it, is informed, be-

lieves and expects to be able to prove at the trial of this cause that the averments in paragraph 8 are untrue.

10. The defendant admits that on or about January 26, 1930, the twenty-eight premises remaining unsold were sold by the sheriff of Delaware County as a result of foreclosure proceedings, and at said sale were sold to the attorney on the writ for the sum of $50 only, and not for the sum of $50 each. The defendant avers that the other allegations in paragraph 9 are immaterial.

11. The defendant, after having made inquiry from all sources of information open to it, is informed, believes and expects to be able to prove at the trial of this cause that the plaintiff has received a sum in excess of $13,026.02 on account of its said collateral note of $28,000 from Copley Homes, Inc.

NEW MATTER.

12. The defendant avers that the said bond, Exhibit "A" of the statement of claim, provides, *inter alia:*

> "In addition to any other remedy or measure of damage provided for or recoverable under the terms of this Bond, any one or more of the herein named obligees are hereby authorized and empowered (in their respective discretion) at the expense of, in the name of, and for the joint or several account of the Obligors, to do any or all of the following things (shown in paragraphs (a) to (c), inclusive):
>
> "(a) On ten days written notice to the herein Surety, any one or more of the said Obligees may replace any contractor who may fail to diligently proceed (for any reason) to perform the work and/or supply the material covered by his or their Contract for any part of the building or improvements covered by the aforesaid Plans and Specifi-

cations and Conditions, and may in place and stead of such replaced Contractor, employ any other party or parties to do, supply and complete the work and/or material called for under the terms of any such Contract. However, said Surety shall have the right within said ten days to arrange for the prompt supply and completion of such work and material, with a party or parties satisfactory as to competence to said Trust Company or its Successors.

"(b) On fifteen days written notice to the herein Surety, any one or more of the said Obligees may pay and discharge, or defend, any Municipal or Mechanics' Lien directed against any of the aforesaid mortgaged premises, when such lien takes precedence or is claimed to take precedence to or over any of the aforesaid First or Second Mortgages. However, within said fifteen days the said Surety may pay and discharge such liens, or may defend same to the satisfaction of said Trust Company or its Successors.

"(c) Should the said buildings and improvements be not fully completed in accordance with the aforesaid Plans and Specifications and conditions within the next ten months from date hereof, any one or more of said obligees may on fifteen days written notice to the herein Surety, arrange or contract for the completion of such unfinished work and/or material. However, said Surety may within the said fifteen days arrange for the completion of said unfinished work and material within sixty days from the date of such notice, by a party or parties satisfactory as to competence to said Trust Company or its Successors."

and that the plaintiff as an obligee under the said bond has failed to comply with the terms and provisions as set forth in the said paragraphs in any particular, and at no time has given the defendant any notice whatsoever of any default in connection with said bond or has exercised any of the rights provided for thereunder.

13. The said bond Exhibit "A" provides further that in the event any of the buildings and improvements are not made and completed free and clear of municipal and mechanics' liens within the ten months' time for completion and any holder of any of the collateral notes shall cause the mortgage collateral or the equity in the mortgage collateral to be offered at public sale upon forty-five days' written notice to said obligors mailed to the Philadelphia office or agency of the defendant, of the place and time when such collateral will be publicly offered for sale, but the defendant avers that the said plaintiff has at no time given any notice whatsoever, as required by the provisions of the said bond, or sold or offered for sale the collateral as therein required.

14. The defendant, after having made inquiry from all sources of information open to it, is informed, believes and expects to be able to prove at the trial of this cause that The Trainor Company has an equity in the first mortgages subject to and above the loans of the Land Title and Trust Company and the Realty Bond & Mortgage Company, and that there is sufficient equity in said loan to reduce materially the collateral note of Copley Homes, Inc., to the plaintiff.

15. The defendant, after having made inquiry from all sources of information open to it, is informed, believes and expects to be able to prove that the plaintiff has at no time taken any action, given any notices or endeavored to collect on the collateral note given to it by Copley Homes, Inc., and that action should be taken thereon before any recourse is had on the bond of the defendant.

16. The defendant avers that at the expiration of the ten months' period from the date of the bond, the real estate and buildings thereon were in such a state of

substantial completion that it required but a small sum of money to complete said operation, and furthermore that said premises in their uncompleted state as of that time were worth and had a fair, reasonable and market value of a sum in excess of the amounts due on the first and second mortgages, including the equity therein, which were security for the collateral note, the basis of this suit.

17. The defendant is informed, believes and expects to be able to prove at the trial of this cause that the plaintiff took title to the land involved in this operation and after settlement therefor conveyed it to Copley Homes, Inc. The purchase price of said land, including settlement charges, etc., amounting to $72,835.87, was not paid by The Trainor Company, but on the contrary by Copley Homes, Inc., out of proceeds of first and second mortgages placed on said real estate at the time of said settlement, said mortgages realizing the sum of $301,000. The plaintiff received from Copley Homes, Inc., a note for $28,000 secured by equities in the first and second mortgages. The defendant is further informed, believes and expects to be able to prove at the trial of this cause that when the plaintiff received the note of The Trainor Company for $28,000 secured as aforesaid, it did not then or at any other time receive from The Trainor Company $28,000 or any other sum whatsoever, and that said note was given without any valuable consideration, and that the mortgage transaction as alleged security for the same was fictitious.

18. The defendant avers that on or about July 25, 1929, it entered into a settlement with The Sun Mortgage Company, representing itself and with the authority of its subsidiary companies, including the Realty Bond & Mortgage Company, covering, among others,

the building operation, the subject of this suit, known as Copley Homes, Inc. By the terms of that settlement, which was in cash from the defendant, The Sun Mortgage Company agreed on its own behalf and acting for and with the authority of its subsidiary companies, including Realty Bond & Mortgage Company, that it would at its own expense complete or cause to be completed in accordance with the plans and specifications, among others, the building operation covered by the bond of the defendant, Aetna Casualty and Surety Company, known as the Copley Homes, Inc., operation the one involved in this suit. The Realty Bond & Mortgage Company was the holder of the second blanket mortgage in the sum of $88,000 on Copley Homes, Inc., in which mortgage the plaintiff claims an equity. The defendant, after having made inquiry from all sources of information open to it, is informed, believes and expects to be able to prove at the trial of this cause that the plaintiff was cognizant of, informed of and acquainted with the terms of the foregoing settlement made by this defendant with The Sun Mortgage Company covering the building operation known as Copley Homes, Inc., prior to its consummation, and that the plaintiff acquiesced therein and agreed thereto, and further agreed that it was interested only in seeing that the said building operation was fully completed. It is further averred that The Sun Mortgage Company, acting for itself and its subsidiary, the Realty Bond & Mortgage Company, did actually complete Copley Homes, Inc., building operation in accordance with the plans and specifications, and that the same was actually completed on December 27, 1929, prior to the filing of the statement of claim in this suit.

The defendant further avers that the plaintiff's rights were subordinated to and become bound by and with the rights of the Realty Bond & Mortgage Company, to whom the mortgage of $88,000 was assigned by

Copley Homes, Inc., and that the settlement made by the Realty Bond & Mortgage Company through The Sun Mortgage Company binds the plaintiff and has terminated and ended all obligations and rights between the parties of this suit.

All of which is true and correct according to the best of the knowledge, information and belief of the deponent, and defendant so expects to be able to prove at the trial of this cause.

WHEREFORE, the defendant denies that it is indebted to the plaintiff in the sum of $18,006 with legal interest thereon from March 1, 1930, or any other sum or sums whatsoever.

JAMES J. MURRAY.

Sworn to and subscribed before me this eleventh day of April, A. D. 1930.

JOHN H. LUCAS.
Notary Public.

PLAINTIFF'S REPLY TO NEW MATTER.

(Filed October 21, 1930.)

12. Plaintiff is advised by counsel, believes and therefore avers that the allegations in paragraph 12 of defendant's new matter are irrelevant and immaterial to the issue, and that it is therefore not required to affirm or deny the same. Plaintiff, however, avers that the provisions of the bond quoted in this paragraph of defendant's new matter grant to the plaintiff additional powers, which it has the privilege of exercising, in its discretion, but which it is under no obligation to assert.

13. Plaintiff is advised by counsel, believes and therefore avers that the allegations in paragraph 13 of defendant's new matter are irrelevant and immaterial to the issue, and that it is therefore not required to affirm or deny the same. Plaintiff, however, avers that the provision of bond referred to in paragraph 13, bestows upon the plaintiff an additional remedy which it has the privilege of, but which it is under no obligation to exercise. Plaintiff avers that the bond specifically provides that the provisions of this paragraph should be deemed an additional method for establishing plaintiff's loss due to incompletion and that "the other rights, promises or obligations existing or arising under the terms of this bond shall remain in force and effect, whether or not said method is employed."

14. Plaintiff is advised by counsel, believes and therefore avers that the allegations in paragraph 14 of defendant's new matter are irrelevant and immaterial to the issue, and that it is therefore not required to affirm or deny the same. Plaintiff, however, denies that it has any equity of any value whatsoever in the

said first mortgages, but on the contrary avers that the first mortgages aggregated $241,000; that on the security of the said mortgages the Land Title & Trust Company loaned to Copley Homes, Inc., the sum of $238,000; that the equity of $3000 was assigned to Realty Bond & Finance Corporation as security for a loan of like amount; that said loan has not been paid, although long past due, and that said equity has been appropriated by Realty Bond & Finance Corporation. Plaintiff avers that under no circumstances could it have benefited by the assignment to it of the said equity of $3000 (which assignment was subject to prior assignments to the Land Title & Trust Company, as partial security of its loan for $241,000, and was also subject to the assignment to Realty Bond & Finance Corporation as partial security for its loan of $63,000) unless and until the obligations to the Land Title & Trust Company and the Realty Bond & Finance Corporation were repaid in full; and that as heretofore set forth, the obligation of Copley Homes, Inc., to the Realty Bond & Finance Corporation was not paid; but on the contrary, the said Realty Bond & Finance Corporation exposed the said building operation to public sale because of default, and there was realized at the said sale the sum of $50 only.

15. Plaintiff is advised by counsel, believes and therefore avers that the allegations in paragraph 15 of defendant's new matter are irrelevant and immaterial to the issue, and that it is therefore not required to affirm or deny the same. Plaintiff denies that action on the said collateral note is a conditioned precedent to recourse on the bond of the defendant. On the contrary, the plaintiff avers that the two obligations are separate, distinct, and in no wise interdependent.

16. Plaintiff is advised by counsel, believes and therefore avers that the allegations in paragraph 16 of

defendant's new matter are irrelevant and immaterial to the issue, and that it is therefore not required to affirm or deny the same. Plaintiff, however, avers that at the expiration of the period of ten months from the date of the bond, the houses were far short of being substantially completed, and that it would require a large sum of money, substantially in excess of plaintiff's financial interest in the operation, to complete the same in accordance with the terms of the bond, upon which this suit is brought. Plaintiff further avers that subsequent to August 13, 1928, sums of money far in excess of plaintiff's financial interest in the operation had to be spent, and in fact were spent, to complete the operation. Plaintiff further avers that the allegation as to the value of the incompleted premises is irrelevant and immaterial, inasmuch as the bond guarantees completed houses worth the encumbrances. Plaintiff, however, is informed, believes and therefore avers that the houses in the condition in which they were as of August 13, 1928, did not have a market value in excess of $4000.

17. Plaintiff is advised by counsel, believes and therefore avers that the allegations in paragraph 17 of defendant's new matter are irrelevant and immaterial to the issue, and that it is therefore not required to affirm or deny the same. Plaintiff, however, avers that good and valuable consideration was given by the plaintiff for the note of Copley Homes, Inc., and the collateral assigned to the plaintiff as security therefor.

18. Plaintiff is advised by counsel, believes and therefore avers that the allegations in paragraph 18 of defendant's new matter are irrelevant and immaterial to the issue, and that it is therefore not required to affirm or deny the same. Plaintiff, however, avers that it has no knowledge or means of knowledge as to

whether any settlement was concluded by the defendant and the Sun Mortgage Company, nor as to the terms thereof. Plaintiff avers that it has exhausted all means of inquiry open to it, and from its inability to obtain any information, and from its knowledge of cognate collateral matters, believes the averments to be untrue, and therefore denies the same. Plaintiff denies that it was cognizant of, informed of, or acquainted with the terms of the alleged agreement prior to its alleged consummation, but on the contrary avers that it had no knowledge whatsoever of the alleged agreement prior to receiving defendant's pleadings alleging it. Plaintiff denies that it, or anyone with authority to speak on its behalf acquiesced therein or agreed thereto, or agreed that the plaintiff was only interested in seeing the buildings completed. Plaintiff again denies the materiality of such allegations, but if deemed material avers that they and each of them are false and untrue.

Plaintiff denies that its rights were in any way subordinated to or bound by the rights of Realty Bond & Finance Corporation as the defendant alleges, and avers that Realty Bond & Finance Corporation had no authority to act for the plaintiff in the premises, and that it is advised, believes and therefore avers that Realty Bond & Finance Corporation and/or the Sun Mortgage Company never claimed such authority, nor purported so to act. Plaintiff denies that it is to any degree affected by any agreements which may have been entered into between Sun Mortgage Company and/or Realty Bond & Finance Corporation with this defendant.

On the contrary, plaintiff avers that there is justly due and owing from the defendant the sum of $18,006 with legal interest thereon from March 1st, 1930.

DAVID L. ULLMAN,
Attorney for Plaintiff.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

EDWARD E. DICKER, being duly sworn according to law, deposes and says that he is the secretary of THE TRAINOR COMPANY, plaintiff in the foregoing action, and authorized by it to take this affidavit on its behalf; that he is familiar with the facts hereinbefore set forth, and the said facts are true.

EDWARD E. DICKER.

Sworn to and subscribed before me this twentieth day of October, A. D. 1930.

REBECCA BUSCHEL,
(Seal) *Notary Public.*

My commission expires at the end of the next session of Senate.

STIPULATION.

(Filed April 24, 1930.)

It is hereby stipulated and agreed between David L. Ullman, attorney for the plaintiff, The Trainor Company, and Joseph W. Henderson, attorney for the defendant, The Aetna Casualty & Surety Company, that paragraph 3 of the statement of claim is admitted, and that said admission shall be considered as paragraph 3 of the affidavit of defense, and that paragraph 3 of the affidavit of defense as filed shall become paragraph 4, and each number thereafter shall accordingly be increased by one to the end thereof, and that the affidavit of defense as filed may be amended in accordance with this stipulation.

DAVID L. ULLMAN,
Attorney for Plaintiff.

J. W. HENDERSON,
Attorney for Defendant.

STIPULATION WAIVING TRIAL BY JURY.

(Filed October 30, 1930.)

It is stipulated and agreed between Ullman & Dicker, attorneys for plaintiff, and Joseph W. Henderson, attorney for defendant, that a jury trial being waived, the issues of fact in this case may be tried and determined by the Court without the intervention of a jury, in accordance with Section 773 of the Judicial Code in such cases made and provided.

ULLMAN & DICKER,
By DAVID L. ULLMAN,
Attorneys for Plaintiff.
(Sgd.) JOSEPH W. HENDERSON,
Attorney for Defendant.

Philadelphia, Pa., October 30, 1930.

OPINION

Sur Pleadings and Proofs.

(Filed February 13, 1931.)

KIRKPATRICK, *J.*

This is a suit by an obligee against the surety upon a bond for the completion of a building operation.

FINDINGS OF FACT.

1. The Trainor Company, plaintiff, on October 13, 1927, conveyed certain real estate to Copley Homes, Inc., a corporation organized to carry out a proposed house building operation. The details are unimportant but it may be taken

(a) that as a result of the transaction Copley Homes owed The Trainor Company $28,000;

(b) that this sum was a part of the purchase price of the real estate; and

(c) that it was all profit to The Trainor Company, accruing to it without any capital investment on its part, simply by turning the land over to Copley Homes at an advance over the price at which it was able to buy it for itself. This last fact was not disclosed to the defendant at any time prior to the execution of the bond in suit.

2. In order to finance its building operation, Copley Homes borrowed money from The Sun Mortgage Company and its subsidiary, Realty Bond and Finance Corporation, two corporations organized to finance building operations, giving to The Sun Mortgage Company as collateral security a separate first mortgage

of $4500 upon each of the fifty-two lots comprising the operation; and to Realty Bond and Finance Corporation, a blanket second mortgage of $88,000 covering the entire tract, which mortgage had a release clause of $2,000 per house. The amounts borrowed were less than the amounts of the mortgages placed and assigned as collateral security, so that the net result of the financing was, in substance and without entering into all of the details, that each of the lots had against it a first mortgage of $4,500 and what amounted to a second mortgage of $2,000, and that there was a small equity in the first mortgage (which may be disregarded) and an equity in the second mortgage over and above the amount borrowed upon it amounting to approximately $636 per lot. Copley Homes paid The Trainor Company the $28,000 due it by giving to The Trainor Co. its note for that amount and assigning to it as collateral the equity in the second mortgage.

3. On the day of the general settlement (October 13, 1927) the bond in suit was executed by Copley Homes as principal and The Aetna Casualty & Surety Company, the defendant, as surety. The obligees were The Land Title & Trust Company (through the medium of which The Sun Mortgage Company made its loan, and which was to act as its agent in handling the funds and paying contractors as the work progressed), Realty Bond and Finance Corporation and The Trainor Company, the plaintiff. The bond had three conditions the first of which was in substance "that, if within ten months within the date hereof each of the lots . . . shall be fully improved and completed with a building, together with the other improvements (such as paved streets, sidewalks, driveways, gas, water, sewerage, etc.), in keeping with and as shown by the aforesaid Plans, Specifications, and Conditions, Building Plats and Surveys, . . . THEN, in the event that all of the

above-and below-mentioned conditions are fully performed, this Bond shall be Void; otherwise it shall remain in full force and effect in law."

4. Copley Homes immediately began building 52 houses on the lots. On August 13, 1928, the date for completion fixed by the bond, 24 houses had been fully completed. The remaining 28 were not far from completion, but sufficient work remained to be done upon them to require a finding (and I so find) that they had not been completed in accordance with the plans and specifications either fully or substantially.

5. Neither the plaintiff nor Copley Homes nor the defendant ever completed the operation. It was, however, ultimately completed on December 27, 1929 by the Sun Mortgage Company, holder of the first mortgages.

6. The value of the 28 uncompleted houses, as of August 13, 1928, was $6,700 each. This amount is in excess of the sum of the amount of the plaintiff's mortgage on each house and all prior liens. In arriving at this value, in addition to the testimony of expert witnesses, the following facts were considered and may be taken as found:

(a) The work actually remaining to be done consisted principally of installation of plumbing accessories such as spigots and shower curtains and rods, painting (which was about 75% complete), papering, installation of gas ranges and minor details in connection with carpenter work, plastering and brick work. The record of work remaining to be done made by the representative of the Land Title Company about August 13, 1928 is accepted as substantially correct.

(b) The original contract price for full completion of all the houses amounted to about $4200 for each

house, (disregarding the slightly larger price for the corner houses). This was the price of building and did not include cost of land or financing.

(c) The price of the land without the houses to The Trainor Company was $76,000 or about $1,461 for each lot, and to Copley Homes $104,000 or $2,000 for each lot.

(d) Subsequent to August 13, 1928, the total sum of $26,071 was spent in completing the operation. Of this amount $4,000 went for street improvements and the balance or $22,071 was spent in completing the houses. This would amount to approximately $788 for each house. How much of the total amount as expended went for work contracted for or actually installed prior to August 13, 1928, the testimony does not disclose. In addition, it is probable that some of the expenditures went for repairs to or replacement of work already done, since an operation which is allowed to stand uncompleted for so long a period is bound to deteriorate to some extent. It is also probable that the amount spent for completion under the new contract represents a smaller proportion of the whole work than an equal amount in the original contract price would have represented.

(e) Twenty of the completed houses were sold for the price of $7,950 each, ten before August 13, 1928, and ten after. The plaintiff concedes that the completed houses as of that date were worth $7,950 each.

(f) During 1928, 1929, and 1930 the value of real estate generally and in the locality in which this operation was, declined steadily.

7. On July 24, 1929, 28 houses being still uncompleted, the defendant made an agreement with The Sun

Mortgage Company which effected the settlement of a number of matters arising out of various surety bonds which the defendant had written for operations in which The Sun Mortgage Company and its subsidiaries were interested, including the Copley Homes operation. One of the terms of that agreement was that The Sun Mortgage Company would complete the Copley Homes operation in accordance with plans and specifications. Thereafter The Sun Mortgage Company did complete the operation, as has been found. In entering into the settlement and in completing the houses The Sun Mortgage Company did not act as agent or in any other capacity for the plaintiff.

8. On January 25, 1930 The Sun Mortgage Company foreclosed its first mortgages buying in all the properties for the sum of $50 and thus wiping out the second blanket mortgage of The Realty Bond and Mortgage Company and the equity of The Trainor Company therein.

9. The plaintiff has received $13,026.02 from Copley Homes on account of its obligation to pay $28,000.

CONCLUSIONS OF LAW.

1. The bond is a bond of guaranty and, there having been a breach, the plaintiff is entitled to judgment.

2. The measure of damages in this case is so much of the difference between the value of the property as of August 13, 1928, with the houses uncompleted, and the value it would have had on that date had the houses been completed as would have been necessary to pay the plaintiff's mortgage debt as well as all prior liens. Since the value of the property as of August 13, 1928 was more than the sum of the plaintiff's mortgage and

prior liens the plaintiff is not entitled to any substantial damages.

3. The plaintiff was not bound to disclose to the defendant the fact that the $28,000 of purchase price owing to it by Copley Homes represented profit made by it without capital investment and arising from merely increasing the price of land which it was in a position to acquire at a lower figure.

4. The so-called settlement agreement of July 24, 1929, had no effect whatever upon the legal rights of the parties so far as they are involved in this suit.

DISCUSSION.

The first question is as to the measure of damages. In order to reach the essence of this question the facts found may be condensed into the following statement:

The plaintiff is the obligee upon a bond given by the owner of certain real estate, the condition of which is that a building operation thereon will be completed by a certain date. The plaintiff's interest in the property consists of what amounts to a third mortgage. The buildings were only partially completed on the day for completion. The property with the operation in its uncompleted state on that day had a value which exceeded the sum of the plaintiff's mortgage and prior liens.

The defendant's position is that, since the value of the property when the breach occurred was sufficient to cover the plaintiff's third mortgage and all prior liens, the plaintiff is entitled to nominal damages only. The plaintiff's position is that, regardless of the relation between the value of the property with the uncompleted operation on it and the amount of its mortgage and prior liens, it is entitled to recover the difference between the value of the property as it was at the time of the breach and as it would have been had the build-

ings been fully completed in accordance with the contract on that day. It may be noted that, in spite of this contention, the plaintiff in his statement claims only so much of the difference as will, with what he has been paid, equal the amount of the money due it and secured by its mortgage.

In fixing the amount of money damages for breach of contract the general purpose of the law is to give compensation—that is, to put the injured party in as good a position as he would have been if the party in default had kept his contract. A limitation upon this rule is that the plaintiff may not ordinarily recover compensation for injurious consequences of the breach which he might reasonably have avoided. Implicit in the rule is the policy of the law that a plaintiff may not through the medium of damages improve his position beyond his injury, or make a profit from the defendant's fault or misfortune.

Applied to building contracts these general principles allow the owner of the land, in case of a default by the builder, after partial performance, to recover the difference between the value of his property with the building in its uncompleted state and its value as it would have been had the contract been fully performed. Or, if completion is reasonably possible and does not involve unnecessary economic waste, then as a method of ascertaining his damages he may complete the building at his own expense, and recover the reasonable cost of so doing. In either case if the builder has given bond the owner's recovery against the surety would be the same as against the principal.

A mortgagee of land upon which buildings are to be erected is, however, not in the same position as the owner. Except as it affects the security for his loan he has no genuine interest in the completion of the work. Obviously, the contention of the plaintiff in this case that the mortgagee like the owner is entitled to the

difference in the value of the completed and the uncompleted job regardless of the value of the land or the amount of the mortgage is unsound. If that were so, the holder of a mortgage secured ten times over by the value of the land alone and having no other interest, could recover from a surety large damages for the breach of a contract to build an expensive structure upon it. The fundamental principles and policy of the law above stated forbid such result.

True, there are cases in which mortgagees or their insurers have at their own expense completed the contract and been allowed the cost of so doing. Among these are Equitable Trust Company v. National Surety Company, 214 Pa. 159, and Zane v. Citizens Trust Company, 117 Fed. 814 (C. C. A. 3d). In both of these cases, however, if the facts be carefully considered, it will be seen that the value of the mortgage was impaired or threatened by failure to complete. In the Equitable Trust Company case the completion by the obligee at its own expense of the contract of a sub-contractor guaranteed by the surety was the means by which the ultimate damages were in all probability greatly reduced, since thus the disorganization of the whole operation and consequent extensive loss were avoided. In Zane v. Citizens Trust Company, it is clear that the default impaired the value of the mortgage more than the penalty of the bond, which was the amount recovered. Even if the cost of completion should be in excess of the loss to the mortgagee, the mortgagee would not profit, since the buildings go upon the land of another and all that he gets in security for his debt. In such case, the only question that might be raised would be whether completion by the mortgagee would result in unnecessarily increasing the damages to the defendant.

In the case at hand, however, we have a mortgagee who has elected not to complete but who has sued for money damages. Parenthetically, it may be said that

the operation never was completed by either of the original parties so that the question whether time is of the essence does not enter into the case. Under the rule of compensation the mortgagee can recover only to the extent that his interest in the subject matter has been adversely affected by the breach. The weight of authority is to the effect that that is the amount by which the value of his mortgage has been impaired. Specifically, the amount is to be ascertained by finding the difference between the value of the houses as they were uncompleted at the time of the breach and their value as of that time if they had been then completed in accordance with the contract and allowing so much of this difference as, added to the uncompleted value, would equal the amount of the mortgage.

In Norway Plains Savings Bank v. Moors, 134 Mass. 129, a case of a guaranty bond, on all fours with the instant case, the court said: "The measure of damages is the difference between the value of the houses as they were in fact built, and the value they would have had if built in conformity to the agreement, or so much of this difference as would have been necessary, with the value of the houses as built, to have paid the mortgage debt and interest then due; . . ." And the court goes on to say that the time for determining these values was the time when the plaintiff did know or should with reasonable diligence have known of the breach.

In Province Securities Corporation v. Maryland Casualty Company (Mass.), 168 N. E. 252, the court said: "Except that as the mortgagee holds the property for security only he cannot recover more than the difference between the value of the property in the condition in which it is left and the amount due on his mortgage." The case was reversed, not because the court below had adopted an incorrect measure of damages but because it accepted the price at the foreclosure sale as conclusive of the value at the time of the breach.

In the latter case the bond was an indemnity bond and not an absolute guarantee of completion. The plaintiff has made much of the distinction between these two classes of bonds but so far as I can see there is no substantial difference in the measure of the damages. In the one case it is compensation measured by anticipated loss, in the other actual loss. In the case of a guaranty bond the right of action accrues upon the breach. In the case of an indemnity bond the plaintiff has no right of action until he actually has incurred a money loss, or in other words; on a guaranty bond he must show loss or else be limited to nominal damages, while on an indemnity bond, if he fails to show loss he will be out of court altogether.

Two New York cases (Kidd v. McCormick, 83 N. Y. 391, and Sachs v. American Surety Company, 72 N. Y. App. Div. 60, 76 N. Y. Supp. 355) appear to state the rule as though the mortgagee is not limited by the extent of his interest, but it will be seen by reference to the later case of Swartz v. Ainwell Company, 227 N. Y. 184, that the principle of damages for compensation only has not been disregarded. That case was a suit upon a bond of guaranty and it was held that the complaint, which did not set forth loss to the plaintiff, failed to state a cause of action. The same is true of United Real Estate Company v. McDonald, 140 Mo. 605, 41 So. W. 913. The point involved there was the failure of the plaintiff to show any difference between the work, completed and uncompleted, and what was said as to the measure of damages was necessarily dictum. In Stuart v. Carter, 79 W. Va. 92, 70 So. E. 537, the only question was whether the plaintiff could sue on a guaranty bond before he had actually paid liens against the property, and, since he had sued to recover only the amount of the lien, the measure of damages was not involved.

In Folz v. Tradesmen's Trust etc. Company, 201 Pa. 583, a suit on a bond of guaranty, the plaintiff had

loaned the principal money to finance his contract with the city, and held no mortgage or other lien. After default the *surety* completed the contract. The recovery was for the amount of the bond but, by reference to the earlier case of Folz v. Amweg, 191 Pa. 157, it will be seen that that was also the amount borrowed. It is also evident that, because of his default, the contractor was wholly unable to pay the plaintiff. In other words the plaintiff's recovery was the amount of his loss. The referee said (p. 588) that whichever way the case was decided "the losing party suffers a loss equal to the amount of the judgment". The value of the work in its uncompleted state is nowhere considered or mentioned, nor is it material, since the plaintiff had no lien.

A somewhat similar situation was presented in Union Trust Company v. Citizens' Trust Company, 185 Pa. 217. In that case the plaintiff was the owner of the ground. It loaned a contractor $2000 which was to be used for building two houses on the land, and took an indemnity bond with the defendant as surety to protect it against loss. The fact that the plaintiff raised the money by means of mortgages on the land is immaterial. The plaintiff's position was not that of a mortgagee but of an owner who had loaned money to the contractor. The damages allowed were the penalty of the bond which represented the plaintiff's actual loss. The court rejected the defendant's offer to show the value of the lots. Obviously this was not a relevant fact since the plaintiff was not the holder of a debt secured by the land, and his loss was the money loaned to the contractor which had nothing to do with the land.

But the plaintiff argues that the mortgagee's interest in the subject matter is not necessarily measured by the face value of his mortgage, that he has contracted for a mortgage secured by an adequate margin, that so secured his mortgage might conceiv-

ably in times of cheap money be worth a premium, and that for these reasons he is entitled to the full amount necessary to bring the property up to the value it would have had had the houses been completed, regardless of the amount of his mortgage. This argument has some merit. The trouble is that it is utterly impossible to do more than guess at an amount which will compensate the plaintiff upon this theory, or to avoid enriching him at the defendant's expense. Thus if we should say that a mortgage ought to be secured by a margin of safety of forty per cent. and allow him that amount as damages, the plaintiff, in a case in which the value of the property just equals the amount of the mortgage, might subsequently foreclose and have his original investment back plus a profit of forty per cent. already allowed as damages. Considerations of this nature no doubt have moved the courts to limit the plaintiff to so much of the difference in the value of the completed and uncompleted operation as will bring his mortgage up to its face value. In German-American Title etc. Company v. Citizens' Trust etc. Company, 190 Pa. 247, the plaintiff's interest consisted of a ground rent. The measure of damages approved by the court in that case (the loss in the market value of the ground rents due to the failure to complete the buildings) obviously arose from the necessities of the situation. The general rule could not well be applied since the plaintiff's lien did not have any face or principal value. There is no suggestion that the rule stated was intended to apply to anything other than ground rents, and (as applied to the facts of the instant case) the difficulties in the way of arriving at a fair market value for third mortgages secured by a margin, comparatively narrow at best, are obvious.

The fact in the instant case that nearly a year and a half after the breach the holder of the first mort-

gages foreclosed and wiped out the plaintiff's security does not affect the situation. Default in the first mortgages might have occurred at any time, even before the completion date. Even assuming that the houses had been completed in accordance with the contract, it is problematical whether, in the event of a default, it would have been wise for the plaintiff to have protected itself by bidding the amount of all the liens. Moreover any number of things totally unconnected with the building operation or with the failure to complete the houses and not reasonably to be foreseen at the time of the giving of the bond might have intervened to depress the value of the property by the time the foreclosure took place. If the value of the property had suddenly increased after the breach, no one would suggest that such fact would affect the plaintiff's right to damages. The plaintiff could have completed and held the defendant for the cost. Zane v. Citizens Trust Company, supra. It did not elect to do so and very likely, in view of its position, would have gained nothing if it had. In such case the only sound and practically applicable measure of damages is that adopted by the courts as set forth herein.

The conclusions reached as to the measure of damages make it unnecessary to discuss in detail the other defenses raised. I have disposed of them in the findings of fact and conclusions of law. The breach being proved the plaintiff will be entitled to nominal damages and I therefore find for the plaintiff and fix the damages at $5.00.

Judgment may be entered accordingly.

By THE COURT:

W. H. KIRKPATRICK, *J.*

MOTION FOR NEW TRIAL.

(Filed February 17, 1931.)

And Now, to-wit, February 17, 1931, the plaintiff moves the Court for a new trial and in support of its motion, assigns the following reasons:

1. Verdict was against the evidence.

2. Verdict was against the weight of the evidence.

3. Verdict was against the law.

4. The learned Court erred in finding in its fourth finding of fact as follows:

> "On August 13, 1928, the date for completion fixed by the bond, 24 houses had been fully completed."

5. The learned Court erred in finding in its sixth finding of fact as follows:

> "The value of the 28 uncompleted houses, as of August 13, 1928 was $6700.00 each."

6. The learned Court erred in finding as fact its finding 6A as follows:

> "The work actually remaining to be done consisted principally of installation of plumbing accessories such as spigots and shower curtains and rods, painting (which was about 75% complete), papering, installation of gas ranges and minor details in connection with carpenter work, plastering and brick work. The record of work remaining to be done made by the representative of the Land Title Company about August 13, 1928 is accepted as substantially correct."

7. The learned Court erred in finding as fact its finding 6D as follows:

"Subsequent to August 13, 1928, the total sum of $26,071 was spent in completing the operating. Of this amount $4000. went for street improvements and the balance or $22,071 was spent in completing the houses. This would amount to approximately $788 for each house. How much of the total amount as expended went for work contracted for or actually installed prior to August 13, 1928, the testimony does not disclose. In addition, it is probable that some of the expenditures went for repairs to or replacement of work already done, since an operation which is allowed to stand uncompleted for so long a period is bound to deteriorate to some extent. It is also probable that the amount spent for completion under the new contract represents a smaller proportion of the whole work than an equal amount in the original contract price would have represented."

8. The learned Court erred in finding as a fact its finding number 9, as follows:

"The plaintiff has received $13,026.02 from Copley Homes on account of its obligation to pay $28,000."

in that the obligation to Copley Homes was to pay $28,000 with interest of 6 per cent. from October 13, 1927.

9. The learned Court erred in finding as its second conclusion of law:

"The measure of damages in this case is so much of the difference between the value of the property as of August 13, 1928 with the houses uncompleted, and the value it would have had on that date had the houses been completed as would have been necessary to pay the plaintiff's mortgage debt as well as all prior liens. Since the value of the property as of August 13, 1928 was more than the sum of the plaintiff mortgage and prior liens the plaintiff is not entitled to any substantial damages."

10. The plaintiff also assigns in support of its motion for a new trial the failure of the learned Court to affirm such of its requests for findings of fact and conclusions of law as the learned Court may decline.

DAVID L. ULLMAN, ESQ.,
Attorney for Plaintiff.

MEMORANDUM OPINION

Sur Motion for a New Trial.

(Filed June 19, 1931.)

Denied.

By THE COURT:

W. H. KIRKPATRICK, *J.*

PLAINTIFF'S MOTION FOR JUDGMENT ON THE RECORD.

(Filed February 17, 1931.)

AND Now, to-wit: on the seventeenth day of February A. D. 1931, comes the plaintiff and moves the Court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record and that judgment be entered upon the record in favor of the plaintiff in the sum of $19,453.98.

DAVID L. ULLMAN, ESQ.,
Attorney for Plaintiff.

October 31, 1931.
Denied.
(Sgd.) W. H. KIRKPATRICK,
J.

PRÆCIPE TO ENTER JUDGMENT.

(Filed December 1, 1931.)

To the Clerk:

Kindly enter judgment on the finding in the above-entitled matter.

(Sgd.) DAVID L. ULLMAN,
Attorney for Plaintiff.

December 1, 1931.

JUDGMENT.

(Filed December 1, 1931.)

Before KIRKPATRICK, *J.*

And now, December 1, 1931, in accordance with the opinion of the Court, and by præcipe filed, judgment in the sum of five dollars is hereby entered in favor of plaintiff and against the defendant, The Aetna Casualty & Surety Company.

By THE COURT:

Attest: E. G. JOHNSON,
Deputy Clerk.

BILL OF EXCEPTIONS.

(Filed December 1, 1931.)

This cause came on for trial before the Honorable William H. Kirkpatrick on November 5, 1930 (a stipulation to try the case before the Court without a jury having been executed by counsel and filed of record) and the following proceedings were had, to wit:

November 5, 1930, the case was tried before the Court without a jury on pleadings and proofs;

December 19, 1930, argument on the record was made before the Court by counsel;

February 13, 1931, the learned trial Judge filed an opinion granting leave to enter judgment in the sum of $5 for plaintiff;

February 17, 1931, plaintiff's motion for new trial filed;

February 17, 1931, plaintiff's motion for judgment on the record filed;

June 19, 1931, order of Court denying motion for new trial filed.

September 2, 1931, præcipe to enter judgment filed;

September 2, 1931, judgment in favor of plaintiff in the sum of $5 filed;

October 21, 1931, order of Court denying motion for judgment on the record filed;

December 1, 1931, præcipe to enter judgment filed;

December 1, 1931, judgment in favor of plaintiff in the sum of $5 filed.

1. Plaintiff excepts to the refusal of the learned trial Judge to affirm the following conclusions of law:

> "The measure of damages for the breach of a bond guaranteeing the performance of a certain act such as the bond in suit is the difference in value between the thing that was guaranteed to

be done, to wit, the houses completed in accordance with the plans and specifications and the value of the thing which was in fact done, to wit houses in the condition in which they were on August 13, 1928, or so much thereof, since the bond runs to the plaintiff as mortgagee, as is required to pay the unpaid balance of principal, and interest in full, not exceeding however the amount of the bond.

2. Plaintiff excepts to the following conclusion of law in the opinion of the learned trial Judge:

"The measure of damages in this case is so much of the difference between the value of the property as of August 13, 1928, with the houses uncompleted, and the value it would have had on that date had the houses been completed as would have been necessary to pay the plaintiff's mortgage debt as well as all prior liens. Since the value of the property as of August 13, 1928 was more than the sum of the plaintiff's mortgage and prior liens the plaintiff is not entitled to any substantial damages."

3. Plaintiff excepts to the following conclusion of law in the opinion of the learned trial Judge:

"February 13, 1931, leave is granted to the plaintiff to enter judgment in the sum of $5.00."

4. Plaintiff excepts to the following conclusion of law in the opinion of the learned trial Judge:

"In the case of a guaranty bond the right of action acrues upon the breach. In the case of an indemnity bond the plaintiff has no right of action until he actually has incurred a money loss, or in other words, on a guaranty bond he must show loss or else be limited to nominal damages, while on an indemnity bond, if he fails to show loss he will be out of court altogether."

5. Plaintiff excepts to the following conclusion of law in the opinion of the learned trial Judge:

"Under the rule of compensation the mortgagee can only recover to the extent that his interest in the subject matter has been adversely affected by the breach. The weight of authority is to the effect that that is the amount by which the value of his mortgage has been impaired. Specifically, the amount is to be ascertained by finding the difference between the value of the houses as they were uncompleted at the time of the breach and their value as of that time had they been then completed in accordance with the contract and allowing so much of this difference as, added to the uncompleted value, would equal the amount of the mortgage."

6. Plaintiff excepts to the action of the Court as follows:

"Sur Motion for New Trial. Denied. By the Court William H. Kirkpatrick, J. June 19, 1931."

7. Plaintiff excepts to the action of the Court as follows:

"Motion for Judgment on the Record:

And now, to wit, on the 17th day of February A. D. 1931, comes the plaintiff and moves the Court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record and that judgment be entered upon the record in favor of the plaintiff in the sum of $19,453.98.

October 21, 1931. Denied. William H. Kirkpatrick, J."

8. Plaintiff excepts to the action of the Court in entering judgment in favor of the plaintiff and against the defendant as follows:

"Before Kirkpatrick, J. And now, September 2, 1931 in accordance with the Opinion of the Court, and by præcipe filed, Judgment in the sum of Five Dollars is hereby entered in favor of the plaintiff

and against the defendant, The Aetna Casualty & Surety Company. By the Court Attest: E. G. Johnson, Deputy Clerk."

9. Plaintiff excepts to the action of the Court in entering judgment in favor of the plaintiff and against the defendant as follows:

"Before Kirkpatrick, J. And now, December 1, 1931 in accordance with the Opinion of the Court and by præcipe filed, Judgment in the sum of Five Dollars is hereby entered in favor of plaintiff and against the defendant, The Aetna Casualty & Surety Company. By the Court Attest: E. G. Johnson, Deputy Clerk."

And Now in furtherance of justice and that right may be done the plaintiff, the said plaintiff enters and presents the foregoing as a bill of exceptions in this case to the act of the Court and prays that same may be settled and allowed and filed and sealed by the Court and made a part of the record and the said be and hereby accordingly is done this first day of December, A. D. 1931.

THE TRAINOR COMPANY.

By Edward E. Dicker,
Secretary,
Appellant.

David L. Ullman,
Attorney for Appellant.

CERTIFICATION OF JUDGE TO BILL OF EXCEPTIONS.

Thereafter on the first day of December, A. D. 1931, and within the time allowed by the United States District Court for the Eastern District of Pennsylvania, the plaintiff duly tendered this its bill of exceptions herein which, having been seen and examined by the Court and counsel is by the Court allowed and approved, and the said bill of exceptions is signed and sealed by the Honorable William H. Kirkpatrick, the Judge of the said Court before whom said proceedings were had and the same is ordered by the said Court to be filed and made part of the record herein which is now accordingly done.

Given under the hand and seal of the Judge of this said Court before whom the said proceedings were held this first day of December, A. D. 1931.

W. H. KIRKPATRICK, *J.*

The above and foregoing bill of exceptions is hereby approved.

ULLMAN & DICKER.
By DAVID L. ULLMAN,
Attorney for Plaintiff.
JOSEPH W. HENDERSON,
Attorney for Defendant.

PETITION FOR APPEAL.

(Filed December 1, 1931.)

To the Honorable William H. Kirkpatrick, Judge of the United States District Court for the Eastern District of Pennsylvania:

THE TRAINOR COMPANY, a corporation organized and existing under the laws of the State of Delaware, your petitioner, which is the plaintiff in the above-entitled case, prays that it may be permitted to take an appeal from the order dismissing its motion for a new trial, entered June 19, 1931, and from the order denying its motion for judgment on the record in favor of the plaintiff in the sum of $19,453.98 and from judgment on the findings in its favor for the sum of $5 entered by defendant on September 2, 1931, and by plaintiff on December 1, 1931, to the United States Circuit Court of Appeals for the Third Circuit, for the reasons specified in the assignments of error which is filed herewith.

And your petitioner prays that an order be made fixing the amount of security for costs which said Trainor Company shall give and furnish upon such appeal.

DAVID L. ULLMAN,
Attorney for Petitioner,
The Trainor Company.

December 1, 1931.

ORDER ALLOWING APPEAL.

(Filed December 1, 1931.)

The petition of the TRAINOR COMPANY, plaintiff in the above-entitled case, from an appeal from the final judgment on the finding, is hereby granted and the appeal is allowed; and petitioner shall file a bond in the sum of $250 for costs with sufficient sureties and conditioned as required by law.

It is further ORDERED that a certified transcript of the record and all proceedings be transmitted to the Circuit Court of Appeals for the Third Circuit.

W. H. KIRKPATRICK,
District Judge.

December 1, 1931.

ASSIGNMENTS OF ERROR.

(Filed December 7, 1931.)

AND NOW, to wit, this seventh day of December, 1931, comes the plaintiff in the above-entitled cause and files the following assignments of error upon which it will rely in the prosecution of its appeal, in the above-entitled cause, from final judgment made by your Honorable Court on the first day of December, 1931:

1. The learned Court erred in refusing to affirm the following conclusions of law:

> "The measure of damages for the breach of a bond guaranteeing the performance of a certain act such as the bond in suit is the difference in value between the thing that was guaranteed to be done, to wit, the houses completed in accordance with the plans and specifications and the value of the thing

which was in fact done, to wit houses in the condition in which they were on August 13, 1928, or so much thereof, since the bond runs to the plaintiff as mortgagee, as is required to pay the unpaid balance of principal, and interest in full, not exceeding however the amount of the bond."

2. The learned Court erred in making the following conclusion of law in its opinion:

"The measure of damages in this case is so much of the difference between the value of the property as of August 13, 1928, with the houses uncompleted, and the value it would have had on that date had the houses been completed as would have been necessary to pay the plaintiff's mortgage debt as well as all prior liens. Since the value of the property as of August 13, 1928 was more than the sum of the plaintiff's mortgage and prior liens the plaintiff is not entitled to any substantial damages."

3. The learned trial Judge erred in making the following conclusion of law in his opinion:

"February 13, 1931 leave is granted to the plaintiff to enter judgment in the sum of $5.00."

4. The learned Court erred in making the following conclusion of law in its opinion:

"In the case of a guaranty bond the right of action accrues upon the breach. In the case of an indemnity bond the plaintiff has no right of action until he actually has incurred a money loss, or in other words, on a guaranty bond he must show loss or else be limited to nominal damages, while on an indemnity bond, if he fails to show loss he will be out of court altogether."

5. The learned Court erred in making the following conclusion of law in its opinion:

"Under the rule of compensation the mortgagee can only recover to the extent that his interest in the subject matter has been adversely af-

fected by the breach. The weight of authority is to the effect that that is the amount by which the value of his mortgage has been impaired. Specifically, the amount is to be ascertained by finding the difference between the value of the houses as they were uncompleted at the time of the breach and their value as of that time had they been then completed in accordance with the contract and allowing so much of this difference as, added to the uncompleted value, would equal the amount of the mortgage."

6. The learned Court erred in dismissing plaintiff's motion for a new trial:

"Sur Motion for New Trial. Denied. By the Court William H. Kirkpatrick, J. June 19, 1931."

7. The learned Court erred in dismissing plaintiff's motion for judgment on the record:

"Motion for Judgment on the Record:

"And now, to wit, on the 17th day of February A. D. 1931 comes the plaintiff and moves the Court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record and that judgment be entered upon the record in favor of the plaintiff in the sum of $19,453.98.

"October 21, 1931. Denied. William H. Kirkpatrick, J."

8. The learned Court erred in entering judgment in favor of the plaintiff and against the defendant as follows:

"Before Kirkpatrick, J. And now, December 1, 1931 in accordance with the Opinion of the Court and by præcipe filed, Judgment in the sum of Five Dollars is hereby entered in favor of plaintiff and against the defendant, The Aetna Casualty & Surety Company. By the Court. Attest: E. G. Johnson, eputy Clerk."

DAVID L. ULLMAN,
Attorney for Plaintiff—
the Appellant.

PRÆCIPE OF PORTION OF RECORD TO BE FILED IN CIRCUIT COURT OF APPEALS.

(Filed December 31, 1931.)

Clerk, U. S. District Court:

Please make and transmit under the Land and seal of the District Court of the United States for the Eastern District of Pennsylvania to the Circuit Court of Appeals for the Third Circuit, the following portions of the record in the above-entitled case:

1. Docket entries.
2. Statement of claim.
3. Affidavit of defense and new matter.
4. Plaintiff's reply to new matter.
5. Stipulation of Counsel.
6. Stipulation waiving trial by jury.
7. Opinion of Court sur pleadings and proofs.
8. Motion for new trial.
9. Dismissal of motion for new trial.
10. Motion for judgment on record and action thereon.
11. Præcipe to enter judgment.
12. Entry of judgment.
13. Bill of exceptions and certification thereof.

14. Petition for appeal.

15. Assignments of error.

16. Præcipe for transcript of record.

17. Clerk's certificate.

(Sgd.) DAVID L. ULLMAN,
Attorney for Plaintiff.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.:*

I, GEORGE BRODBECK, clerk of the United States District Court in and for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and full copy of the original so much of the pleas and proceedings, in the case of The Trainor Company v. The Aetna Casualty & Surety Company, No. 15318, March Term, 1930, as per per præcipe filed, a copy of which is hereto annexed, the transcript of record in the above-entitled case is to include, and now remaining among the records of the said court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of
(Seal) of the aforesaid Court at Philadelphia, this sixteenth day of May, A. D. 1932.

GEORGE BRODBECK,
Clerk.

ORDER AFFIRMING JUDGMENT.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT.

No. 4568. March Term, 1932.

The Trainor Company,

Appellant,

v.

The Aetna Casualty & Surety Company,

Appellee.

And afterwards, to wit, the ninth day of June, 1932, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable Victor B. Woolley and Honorable J. Whitaker Thompson, *Circuit Judges,* and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the twenty-first day of December, 1932, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

No. 4568. March Term, 1932.

THE TRAINOR COMPANY,

Plaintiff-Appellant,

v.

THE AETNA CASUALTY AND SURETY COMPANY,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

OPINION.

(Filed December 21, 1932.)

Before BUFFINGTON, WOOLLEY and THOMPSON, *Circuit Judges.*

BUFFINGTON, *J.*

In the Court below The Trainor Company (hereafter called Trainor) brought suit against The Aetna Casualty and Surety Company (hereafter called Aetna) upon a bond given to Trainor and others by Aetna and others, which bond Trainor claimed, so far as it concerned it, was breached. Jury was waived. The Court made findings of fact, among which was that the bond had been breached and Trainor was entitled

to damages, but it further found such damage was nominal. It therefore entered judgment in favor of Trainor for five dollars. Thereupon Trainor took this appeal.

As all aspects of this somewhat complicated case are recited and can be seen in the opinion of the trial Judge at 49 Fed. (2d) 769, we refrain from needless restatement and detail discussion, for the facts of the case here pertinent were established by the findings of the Judge sitting as a jury and are not reviewable and the only question now involved is whether on the facts so found, the Court committed error in awarding Trainor mere nominal damages.

By the recitals of the bond Trainor "is to have the equity in the said Fifty-two mortgages subject to and above" certain other claims, etc. And the condition of the bond was, "That, if within ten months from the date hereof each of the lots or premises described in each of the said Fifty-two First Mortgages shall be fully improved and completed with a building, together with the other improvements (such as paved streets, sidewalks, driveways, gas, water, sewerage, etc.), in keeping with and as shown by the aforesaid Plans, Specifications and Conditions, Building Plats and Surveys . . . . Then, in the event that all of the above and below mentioned conditions are fully performed, this Bond shall be void, otherwise, it shall remain in full force and effect in law."

Being dated October 13, 1927, Aetna's obligation called for August 13, 1928 as the date for complying therewith. The then status was found by the Court as follows: "On August 13, 1928, the date for completion fixed by the bond, 24 houses had been fully completed. The remaining 28 were not far from completion, but sufficient work remained to be done upon them to require a finding (and I so find) that they had not been

completed in accordance with the plans and specifications either fully or substantially. . . . The value of the 28 uncompleted houses, as of August 13, 1928, was $6,700 each. This amount is in excess of the sum of the amount of the plaintiff's mortgage on each house and all prior liens. . . . During 1928, 1929, and 1930 the value of real estate generally and in the locality in which this operation was, declined steadily. . . . On January 25, 1930 The Sun Mortgage Company foreclosed its first mortgages buying in all the properties for the sum of $50 and thus wiping out the . . . equity of The Trainor Company therein."

Upon these facts the trial Court held: "The measure of damages in this case is so much of the difference between the value of the property as of August 13, 1928, with the houses uncompleted, and the value it would have had on that date had the houses been completed as would have been necessary to pay the plaintiff's mortgage debt as well as all prior liens. Since the value of the property as of August 13, 1928 was more than the sum of the plaintiff's mortgage and prior liens the plaintiff is not entitled to any substantial damages." Was it in error in so holding?

The trial Judge, after stating the law as to the rights of a land owner against a builder where the latter fails to complete, and calling to attention that the present case is not one of an owner but of a mortgagee, says: "A mortgagee of land upon which buildings are to be erected is, however, not in the same position as the owner. Except as it affects the security for his loan he has no genuine interest in the completion of the work. Obviously, the contention of the plaintiff in this case that the mortgagee like the owner is entitled to the difference in the value of the completed and uncompleted job regardless of the value of the land or the amount of the mortgage is unsound. If that were so, the holder of a mortgage secured ten times over by

the value of the land alone and having no other interest, could recover from a surety large damages for the breach of a contract to build an expensive structure upon it. The fundamental principle and policy of the law above stated forbid such result. . . . The fact in the instant case that nearly a year and a half after the breach the holder of the first mortgages foreclosed and wiped out the plaintiff's security does not affect the situation. . . . Moreover any number of things totally unconnected with the building operation or with the failure to complete the houses and not reasonably to be foreseen at the time of the giving of the bond might have intervened to depress the value of the property by the time the foreclosure took place. If the value of the property had suddenly increased after the breach, no one would suggest that such fact would affect the plaintiff's right to damages."

The cases bearing on the question here involved have in the main been so fairly and fully discussed in the trial Judge's opinion as to necessitate no further analysis. We have not overlooked the case of Purdy v. Massey, 306 Pa. 288, subsequent to the case in hand, and where there will be found a full discussion of the opposing views in the majority and dissenting opinions.

It is urged that the law of Purdy v. Massey is local to the Commonwealth of Pennsylvania where the contract in suit was intended to be performed and that, being local law, federal courts are bound to follow it, relying, evidently, upon Lubriko Co. v. Wyman, 290 Fed. 12, 17. The expression in that case was but a compressed statement of the law more fully stated by this court in Snare & Triest Co. v. Friedman, 169 Fed. 1, 10, 11, 12, and expressly based on Swift v. Tyson, 16 Peters 1, 8; 10 L. Ed. 865.

We do not regard the decision in Purdy v. Massey as creating a new local law of Pennsylvania but that,

at most, it declared the common law of that state (as those terms are used in the two decisions last cited) with respect not to property but to the subject of suretyship, which from its very nature is general law running, like commercial law, broadly through all the states. In such case "where the common law of the state is derived from the principles of general jurisprudence common to all the states" a federal court may (as we have done) exercise an independent judgment as to what is the law without respect to the decision of the state court as binding authority.

We are of opinion the Court below committed no error in holding that when on August 13, 1928, Trainor's mortgage was protected and, therefore, it committed no error in restricting the judgment to nominal damages.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

ORDER AFFIRMING JUDGMENT WITH COSTS.

(Filed December 21, 1932.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT.

No. 4568. March Term, 1932.

The Trainor Company,
Appellant,

v.

The Aetna Casualty & Surety Company,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia,
December 21, 1932.

Per Curiam,
BUFFINGTON,
Circuit Judge.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *Sct.:*
THIRD JUDICIAL CIRCUIT,

I, William P. Rowland, clerk of the United States Circuit Court of Appeals, for the Third Circuit, Do HEREBY CERTIFY the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this court in the case of The Trainor Company, Appellant, v. The Aetna Casualty & Surety Company, Appellee, No. 4568, on file, and now remaining among the records of the said court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this eighteenth day of March, in the year of our Lord one thousand nine hundred and thirty-three and of the Independence of the United States the one hundred and fifty-seventh.

(Seal)

WILLIAM P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 24, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3765)